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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

12 ENTROPIC COMMUNICATIONS,
13 LLC,

14 Plaintiff,

15 v.

16 DISH NETWORK CORPORATION,
17 et al.,

18 Defendants.

20 DISH NETWORK CALIFORNIA
21 SERVICE CORPORATION,

22 Counter-Claimant

23 v.

24 ENTROPIC COMMUNICATIONS,
25 LLC; MAXLINEAR, INC.; AND
MAXLINEAR COMMUNICATIONS
LLC,

26 Counter-Defendants.

Case No. 2:23-cv-1043-JWH-KES
(Lead Case)

**REDACTED VERSION OF
DOCUMENT PROPOSED TO BE
FILED UNDER SEAL**

**COUNTER-DEFENDANTS
MAXLINEAR, INC. AND
MAXLINEAR COMMUNICATIONS
LLC'S NOTICE OF MOTION AND
MOTION TO DISMISS
COUNTERCLAIMS BY DISH
NETWORK CALIFORNIA
SERVICE CORPORATION**

JURY TRIAL DEMANDED

*[Request for Judicial Notice
concurrently filed herewith]*

Judge: Hon. John W. Holcomb

Action Filed: Feb. 10, 2023
Counterclaims Filed: Sept. 21, 2023

Hearing:

Date: Feb. 2, 2024
Time: 9:00 a.m.
Place: Courtroom 9D, Santa Ana
Judge: Hon. John W. Holcomb

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 **PLEASE TAKE NOTICE** that on February 2, 2024, at 9:00 a.m., or as soon
3 thereafter as counsel may be heard in Courtroom 9D of the United States District
4 Court for the Central District of California, located at 411 W. 4th Street, Santa Ana,
5 California, Counter-Defendants MaxLinear, Inc. and MaxLinear Communications
6 LLC (“MaxLinear”) move to dismiss all counterclaims brought against them by
7 Dish Network California Service Corporation (“Dish”).

8 MaxLinear bases this motion on this notice; the attached memorandum of
9 points and authorities; all pleadings, files, and records in this action; the request for
10 judicial notice filed concurrently herewith and the accompanying declaration of
11 Rose Lee; any reply memorandum; and other argument and evidence that the
12 parties may present at the hearing on this motion. Under Local Rule 7-3, counsel
13 conferred in advance of this motion on November 15, 2023 and November 17,
14 2023.

16 | Date: December 22, 2023

By: /s/ Bita Rahebi
Bita Rahebi

Attorney for Counter-Defendants
MAXLINEAR COMMUNICATIONS LLC
AND MAXLINEAR, INC.

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1 **I. INTRODUCTION**

2 This lawsuit involves the Dish Defendants' alleged infringement of patents
3 originating from Entropic, Inc., a founding member of the Multimedia over Coax
4 Alliance ("MoCA"). MaxLinear, Inc. acquired Entropic, Inc. in 2015 and assigned
5 the patents-in-suit to plaintiff, Entropic Communications, LLC ("Entropic"), in
6 2021. Entropic alleges that Dish infringes these patents by practicing the MoCA
7 standards.

8 In response to Entropic's claims, one of the Dish entities, Dish Network
9 California Service Corporation ("Dish"), asserted four counterclaims¹ against
10 MaxLinear, Inc. and MaxLinear Communications LLC (collectively,
11 "MaxLinear"). All four counterclaims depend on the same brittle allegation, *i.e.*,
12 that Dish is entitled to a patent license on reasonable and nondiscriminatory
13 ("RAND") terms under MoCA's Intellectual Rights Policy ("IPR Policy") because
14 one of Dish's affiliates, "EchoStar (now DISH Technologies L.L.C.)," was a
15 MoCA member.

16 As an initial matter, Dish failed to attach or incorporate the alleged
17 agreements at issue. It provided only a URL link to a *blog* that has an outdated IPR
18 policy, which, on its face, is incomplete because it refers to yet other documents
19 and agreements. As such, Dish has failed to plead fully the contract's terms.

20 All of Dish's claims can—and must—be dismissed because its core
21 allegation is implausible and for a host of other reasons:

22 **The pled MoCA IPR Policy does not, in fact, require the licensing of
23 affiliates, like Dish.** It only places "limited obligations" on an "Alliance Party"

24

¹ This Motion refers to the paragraphs of Dish's pleading (ECF No. 111) before
25 ¶ 505 as the "Answer" and the paragraphs thereafter as the "Counterclaims."
26 Although Dish's pleadings remain ambiguous as to which Counterclaims apply to
27 MaxLinear, Dish has clarified that the Counterclaims asserted against MaxLinear
28 are III (declaration that patent assignment is void), IV (breach of RAND
commitment), V (fraud and negligent misrepresentation), and VI (civil conspiracy).
(See Declaration of Rose S. Lee ("Lee Decl.") Ex. 1 at 9-10.)

1 and its affiliates to offer a license to its essential patent claims to another Alliance
2 Party. It does not obligate an Alliance Party to offer a RAND license to an *affiliate*
3 of another Alliance Party. The Promoter Agreement which governed EchoStar's
4 membership in MoCA [REDACTED]

5 [REDACTED]² Dish's pleadings do not identify any provision of the
6 IPR Policy or any other related agreement to the contrary.

7 **Dish lacks standing.** Because Dish is not entitled to a license under the IPR
8 Policy, nor a beneficiary of the IPR Policy, and cannot enforce its terms, Dish lacks
9 standing to assert a breach of contract or seek a declaration that MaxLinear's
10 assignment of the patents to Entropic is void.

11 **A RAND License requires a “written request.”** Even if Dish had been an
12 Alliance Party, which it never was, the IPR Policy obligates an Alliance Party to
13 offer a RAND license to another Alliance Party only upon the written request for a
14 license. In its pleading, Dish fails to make such an averment.

15 **Dish does not identify the governing MoCA standard.** Having withdrawn
16 from MoCA, EchoStar is no longer an Alliance Party. Regarding former Alliance
17 Parties, the IPR Policy only requires that an Alliance Party offer a RAND license to
18 those standards approved while the former party was a MoCA Alliance Party. In its
19 Counterclaims, Dish does not identify under which standard(s) it or EchoStar
20 allegedly is entitled to a license, or plead that such standard(s) were approved while
21 EchoStar was a MoCA Alliance Party.

22 **Dish’s counts for fraud, misrepresentation, and civil conspiracy do not
23 state a claim.** Dish comes nowhere near meeting the heightened pleading standard
24 for fraud and misrepresentation. *See Fed. R. Civ. P. 9(b).* Among other
25 deficiencies, Dish does not specify who allegedly misrepresented what, who
26 received the misrepresentation, and how Dish relied on it. Dish’s civil conspiracy

27 _____
28 ² MaxLinear concurrently has filed a Request for Judicial Notice of the Promoter
Agreement.

1 count depends on Dish’s breach of contract, fraud, and misrepresentation counts, so
2 it warrants dismissal for the same reasons.

3 Given that amendment would be futile, MaxLinear asks that the Court
4 dismiss Counts III–VI with prejudice and without leave to amend.

5 **II. BACKGROUND**

6 **A. Entropic, Inc. and MaxLinear**

7 Entropic, Inc. was a founding member of MoCA. (Complaint (ECF No. 1),
8 ¶¶ 23–27.) Regarded as a technological innovator, Entropic, Inc. created a novel
9 networking architecture to accomplish “what was considered unlikely or
10 impossible”: “mak[ing] a high-speed point-to-point digital communication network
11 using existing coax installations.” (*Id.*, ¶ 26.)

12 MaxLinear, Inc. is a leading innovator of radiofrequency, analog, digital, and
13 mixed-signal semiconductor solutions. In 2015, MaxLinear, Inc. acquired Entropic,
14 Inc. and its MoCA-related intellectual property, including the asserted patents. (*Id.*,
15 ¶ 21.) In 2021, MaxLinear, Inc. transferred these and other patents to Entropic, the
16 plaintiff in this action. (*Id.*, ¶ 22.)

17 **B. MoCA and the IPR Policy**

18 MoCA is a standard-setting organization formed to “develop[] and promot[e]
19 specifications for the transport of digital entertainment and information content
20 over in-home coaxial environments, and to develop a certification process for
21 products implementing the specifications to ensure interoperability between
22 products and manufacturers.” (IPR Policy, § 1;³ *see also* Counterclaims, ¶ 521.)

23 MoCA adopted an IPR Policy that imposes upon participants (“Alliance
24 Parties”)⁴ and their affiliates a limited obligation to offer licenses to “Essential

25 _____
26 ³ For the purposes of this Motion only, MaxLinear references Dish’s URL
27 hyperlink to a blog that has a MoCA IPR Policy, dated 2011. (Counterclaims, ¶
528, n. 12.)

28 ⁴ Under section 2 of the IPR Policy, an “Alliance Party” is a “Participant or a
Voting Member.” “Participant” refers to a “non-voting class of participant as

1 Patent Claims.” (IPR Policy, §§ 2, 5.1.1; Counterclaims, ¶ 531.) Essential Patent
2 Claims are claims that (1) are necessarily infringed by complying with the technical
3 specifications of an approved MoCA standard and (2) lack commercially
4 reasonable non-infringing alternatives. (IPR Policy, § 2.)

5 The IPR Policy does not require an Alliance Party to seek out and offer a
6 patent license to anyone practicing a MoCA standard. Rather, an Alliance Party
7 need only offer a license “upon the written request” of another Alliance Party. (IPR
8 Policy, § 5.1.1.) An Alliance Party’s licensing obligation is limited to Essential
9 Patent Claims and only to the extent “necessary to use, make, have made, offer for
10 sale, sell and import” “Fully Compliant Products.”⁵ (*Id.*) Importantly, an Alliance
11 Party and its “Affiliates” owe this limited licensing obligation only to another
12 Alliance Party, **not** to its affiliates. (*Id.*, §§ 2, 5.1.1.)

13 If an Alliance Party terminates its participation in MoCA, the former
14 Alliance Party may submit a written request for a license only under a MoCA
15 standard approved before it terminated its membership. (IPR Policy, § 7.2.) The
16 former Alliance Party may not invoke the IPR Policy to request a license to
17 standards approved after its MoCA membership ended. (*Id.*)

18 **C. Dish**

19 Prior to initiating this action, Entropic allegedly offered Dish a license to the
20 asserted patents on multiple occasions, but Dish refused. (Complaint, ¶ 16.) In
21 February 2023, Entropic thus sued Dish for infringing the asserted patents by
22 practicing the MoCA standards.

23

24 defined [] by Section 3.3 of the Alliance Bylaws.” “Voting Member” refers to a
25 “voting class of member as defined by Section 3.2 of the Alliance Bylaws.” Dish
26 does not provide the Alliance Bylaws in its Counterclaims. The Alliance Bylaws
27 are available at https://mocalliance.org/Join/agreements/MoCA_Associate_Agreement_editedrs_210413.pdf.

28 ⁵ A “Fully Complaint Product” refers to the specific portions of a product that
implement a MoCA standard. (IPR Policy, § 2.)

1 Dish disputes that the “[a]sserted [p]atents . . . are necessary to products that
2 implement any MoCA standard.” (Counterclaims, ¶ 509.) And if, in fact, any of its
3 products “implement any part of any MoCA standard,” Dish disputes that their
4 “implementation[]. . . practice[s] the Asserted Patents.” (*Id.*)

5 Dish does not contend that it is or ever was a MoCA Alliance Party. It
6 argues only that its affiliate, “EchoStar (now DISH Technologies L.L.C.),” was
7 once a MoCA member. (*Id.*, ¶ 522.) Dish also concedes that EchoStar is no longer
8 an Alliance Party. (*Id.*, ¶ 535.)

9 **III. LEGAL STANDARD**

10 Under Rule 12(b)(1), a counter-defendant may challenge standing. As the
11 party invoking the federal court’s jurisdiction, a counterclaimant like Dish bears the
12 burden of alleging specific facts sufficient to prove its Article III standing. *See*
13 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

14 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, “a complaint
15 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief
16 that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting
17 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Dismissal for failure to
18 state a claim is proper “where there is no cognizable legal theory or an absence of
19 sufficient facts alleged to support a cognizable legal theory.” *L.A. Lakers, Inc. v.*
20 *Fed. Ins. Co.*, 869 F.3d 795, 800 (9th Cir. 2017).

21 A “claim has facial plausibility when the plaintiff pleads factual content that
22 allows the court to draw the reasonable inference that the defendant is liable for the
23 misconduct alleged.” *Ashcroft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).
24 Although it must accept as true all factual allegations in a complaint, a court need
25 not do so for “allegations that are merely conclusory, unwarranted deductions of
26 fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d
27 979, 988, *amended*, 275 F.3d 1187 (9th Cir. 2001). “Threadbare recitals of the
28 elements of a cause of action, supported by mere conclusory statements, do not

1 suffice” to avoid dismissal. *Ashcroft*, 556 U.S. at 678.

2 In assessing a motion to dismiss, the court may consider documents that the
3 complaint references or that are integral to its claims. *See Consumer Sols. REO,*
4 *LLC v. Hillery*, 658 F. Supp. 2d 1002, 1009 n.4 (N.D. Cal. 2009) (allowing judicial
5 notice of documents referenced in counter-complaint); *Parrino v. FHP, Inc.*, 146
6 F.3d 699, 706 (9th Cir. 1998) (“[A] district court ruling on a motion to dismiss may
7 consider a document the authenticity of which is not contested, and upon which the
8 plaintiff’s complaint necessarily relies.”), superseded by statute on other grounds
9 as stated in *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006). “Even if
10 . . . not attached to a complaint, [a document] may be incorporated by reference . . .
11 if the plaintiff refers extensively to the document or [it] forms the basis of the
12 plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

13 When considering referenced or incorporated documents, a court may
14 consider the documents in their entirety and not merely the portions mentioned or
15 quoted in the complaint. *See In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4
16 (9th Cir. 1996). Dismissal is appropriate when a document that forms the basis of a
17 claim negates that claim. *See Valley Nat’l Bank v. Mundo Trucking*, 2021 WL
18 6882194, at *3 (C.D. Cal. Dec. 29, 2021) (“[W]hen a written instrument contradicts
19 allegations in a complaint to which it is attached, the exhibit trumps the
20 allegations.”) (citation omitted).

21 IV. ARGUMENT

22 A. Count IV: Dish Fails to Plead Facts Supporting Its Claim That 23 MaxLinear or Entropic Was Obligated to Offer a RAND License

24 MaxLinear addresses Dish’s breach of contract claim (Count IV) first, as this
25 claim forms the basis of all four counterclaims against MaxLinear. Dish asserts
26 that MaxLinear breached a contractual obligation by failing to offer it a RAND
27 license under the IPR Policy. (See Counterclaims, ¶¶ 554–56.)

28 “A cause of action for breach of contract requires proof of the following

elements: (1) existence of the contract; (2) plaintiff’s performance or excuse for nonperformance; (3) defendant’s breach; and (4) damages to plaintiff as a result of the breach.” *CDF Firefighters v. Maldonado*, 158 Cal. App. 4th 1226, 1239 (2008). Dish has failed to provide this Court with the purported contract and to plead the elements for a breach claim, warranting Count IV’s dismissal.

**1. Dish’s Failure to Disclose the Alleged Contract and Its
Reliance on a Superseded Version Merit Dismissal**

“[F]air notice of [a] breach of contract claim” requires “identify[ing] the specific terms of the specific agreements that Defendant allegedly breached.” *Bella+Canvas, LLC v. TSC Apparel, LLC*, 2020 WL 7048306, at *2 (C.D. Cal. Sept. 17, 2020). “If the action is based on an alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint, or a copy of the written contract must be attached to the complaint or incorporated by reference.” *Roman v. Vericrest Fin., Inc.*, 2013 WL 12142960, at *2 (C.D. Cal. Dec. 3, 2013).

Here, Dish has not satisfied the pleading requirements for a breach of contract claim. Despite claiming rights as a purported “affiliate” of EchoStar, Dish did not disclose the alleged contract in its Counterclaims. Neither has Dish set forth the terms of the contract that MaxLinear allegedly breached in the body of the Counterclaims, nor incorporated it, nor attached it as an exhibit.

Instead, Dish directs the Court to an alleged copy of the contract at issue in a third-party blog: https://www.essentialpatentblog.com/wp-content/uploads/sites/64/2013/05/MOCA-IPR-Policy-Approved-1_24_11.pdf. (See Counterclaims, ¶ 527 n.12.) That hyperlink points to what appears to be a 2011 version of the IPR Policy. But the hyperlinked policy does not identify the parties to the policy, provide a signature block, or even indicate that it was executed.

Moreover, the hyperlinked 2011 IPR Policy refers to yet other documents, which confirms it is incomplete. The “Definitions” section refers to “definitions ascribed to [terms] in the *Alliance Bylaws* or the *Applicable Agreement*.” (IPR

1 Policy, § 2 (emphasis added).) Neither document is referenced in, or attached, to
2 the pleading. For example, it indicates that ““Affiliates’ shall have the meaning set
3 forth in the Alliance’s Bylaws.” (*Id.*) Dish claims a license as an “affiliate” of
4 EchoStar, but fails to include the definition of the term.

5 The IPR Policy also states that ““Applicable Agreement’ means the
6 agreement that governs the relationship between an Alliance Party and the Alliance
7 at the time an issue arises, including, without limitation, Promoter Member
8 Agreement (as defined in Section 3.1 of the Alliance Bylaws), other Voting
9 Member Agreement (as defined in Section 3.2 of the Alliance Bylaws) or
10 Participant Agreement (as defined in Section 3.3 of the Alliance Bylaws). . . .” (*Id.*)
11 Yet Dish neglected to attach the Alliance Bylaws or any Applicable Agreement(s)
12 to its Counterclaims.

13 Worse still, the hyperlinked IPR policy apparently was superseded in 2017.
14 See *Entropic v. Cox Commc’ns, Inc.*, No. 23-cv-1047, ECF No. 94-1 (C.D. Cal.
15 Oct. 6, 2023) (in this Court’s parallel proceedings, another defendant cites a 2017
16 IPR Policy while itself omitting the referenced documents) (Request for Judicial
17 Notice, Exhibit A).⁶ The 2017 document filed by Cox states, “This IPR Policy
18 supersedes any and all prior documentation regarding the Intellectual Property of
19 the Alliance.” (*Id.*, ¶ 1.) Even assuming the IPR Policy was a stand-alone
20 document (and it was not), Dish cannot state a claim for alleged breach of the IPR
21 Policy due to conduct after 2017 because the 2017 policy supersedes the 2011
22 version. See *Rack Safety Prod., LLC v. Double Backstop, Inc.*, 2023 WL 3432250,
23

24 ⁶ MaxLinear concurrently requests judicial notice as to the submission to the docket of a document described as the 2017 MoCA IPR Policy to the Court’s docket. See Fed. R. Evid. 201(b)(2). In the Ninth Circuit, “court filings and other matters of public record” are sources whose accuracy cannot reasonably be questioned for the purposes of Rule 201. *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); see also *Arroyo v. DTPS C-12, LLC*, 2022 WL 17224717, at *1 (C.D. Cal. Jan. 31, 2022) (Holcomb, J.) (granting judicial notice of court cases and related public legal documents, as they “fall comfortably within the ambit of Rule 201”).

1 at *5 (C.D. Cal. Mar. 9, 2023) (“[B]ecause the 2016 Agreement superseded the
2 2015 Agreement, the Court concludes that Rack Safety cannot state a claim for
3 breach of the 2015 Agreement based on Defendants’ conduct after 2016.”). For this
4 reason alone, the Court must dismiss Dish’s counterclaim for breach of contract.

5 Dish’s failure to attach a copy of the allegedly governing agreements, to
6 identify the specific terms allegedly breached, or even to provide the full context to
7 those terms requires dismissal of its Counterclaims against MaxLinear. *See*
8 *Bella+Canvas, LLC*, 2021 WL 8134400 at *2 (dismissing breach claim where
9 Plaintiff failed to attach a copy of the alleged contract, to quote from the contract,
10 or adequately to plead the terms of the contract either *in haec verba* or according to
11 legal effect).

12 **2. Dish Fails to Plead the Existence of a Contract that Gives It
13 Any Rights under the IPR Policy**

14 Dish also has failed to plead facts giving rise to a reasonable inference that
15 MaxLinear was obligated to offer it a license under the IPR Policy whatsoever.
16 Dish does not claim to be a contracting party with MoCA or to have any other
17 direct relationship with MoCA. Instead, it contends, “Dish California by virtue of
18 its affiliation with EchoStar, a founding member of MoCA in 2004, Dish California
19 is a beneficiary of the MoCA IPR Policy.” (Counterclaims, ¶ 553.)

20 The MoCA IPR Policy does not confer any rights upon affiliates of MoCA
21 members. Section 5.1.1 of the IPR Policy provides: “upon the written request of
22 any other then-current Alliance Party, each Alliance Party shall offer to license to
23 the ***requesting Alliance Party(ies)*** . . . such Alliance Party’s and its Affiliates’
24 Essential Patent Claims.” (IPR Policy, §5.1.1 (emphasis added).) In short,
25 although an Alliance Party and its affiliates must offer to license their Essential
26 Patent Claims in response to a written request of an Alliance Party, the IPR Policy
27 does not obligate an Alliance Party to provide a license offer to an affiliate of an
28 Alliance Party.

1 Underscoring that affiliates lack the right to request a license is the fact that,
2 as a textual matter, the IPR Policy distinguishes Alliance Parties from Affiliates and
3 treats them differently throughout the document. (*See generally id.*) Dish cannot
4 try to smear the ink and conflate the two. Additionally, Section 5.3 of the IPR
5 Policy explains that “no license, immunity or other right is granted under this IPR
6 Policy by any Alliance Party or its Affiliates to any other Alliance Parties or their
7 Affiliates or to the Alliance, either directly or by implication, estoppel or otherwise,
8 *other than the agreement to grant licenses expressly set forth herein.*” (*Id.*, § 5.3
9 (emphasis added).)

10 [REDACTED], which is central to Dish’s
11 purported rights. Dish’s breach of contract claim that it is entitled to a RAND
12 license offer is wholly derivative of EchoStar’s rights as a MoCA member.
13 EchoStar’s rights as a MoCA member, in turn, are governed by its membership
14 agreement with MoCA – the Promoter Agreement.

15 Curiously, Dish failed to provide the Court with the Promoter Agreement.
16 MaxLinear, however, obtained the Promoter Agreement from Dish and seeks
17 judicial notice of it. (Request for Judicial Notice, Exhibit B (“Promoter
18 Agreement”).)⁷ The Promoter Agreement [REDACTED],
19 rendering it implausible. It states:

20
21
22 ⁷ The Court should take judicial notice of the Promoter Agreement signed by
23 EchoStar Technologies Corporation, which was produced by Dish in this action. In
24 the Ninth Circuit, Courts may incorporate by reference documents where (1) the
25 complaint “necessarily relies” on the documents or contents thereof, (2) the
26 document’s authenticity is uncontested, and (3) the document’s relevance is
27 uncontested. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010)
28 (taking notice of an agreement that the facts suggested was “integral” to the
complaint); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (“We
have extended the ‘incorporation by reference’ doctrine to situations in which the
plaintiff’s claim depends on the contents of a document, the defendant attaches the
document to its motion to dismiss, and the parties do not dispute the authenticity of
the document, even though the plaintiff does not explicitly allege the contents of
that document in the complaint.”).

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED] Dish does not plead that

11 it ever executed any applicable membership agreements. Thus, MaxLinear's
12 alleged failure to offer Dish a RAND license pursuant to the IPR Policy could not
13 breach that policy because MaxLinear was never obligated to make such an offer.

14 Similarly, Dish has no standing to sue MaxLinear for a breach of contract.
15 *Wells Fargo Bank, N.A. v. Am. Nat'l Ins. Co.*, 2009 U.S. Dist. LEXIS 134120, *14
16 (C.D. Cal. Aug. 12, 2009) ("[g]enerally, a non-party to a contract has no right, duty,
17 or obligation under [it].") Although Dish claims to be a "beneficiary of the MoCA
18 IPR Policy" "by virtue of its affiliation with EchoStar, a founding member of
19 MoCA in 2004" (Counterclaims, ¶ 553), as a matter of law, "the terms of the
20 contract must demonstrate the express intent to confer [that] benefit" on Dish for it
21 to claim the mantle of a third-party beneficiary. *Sherman v. Pepperidge Farm, Inc.*,
22 2023 WL 5207458, at *4 (C.D. Cal. Apr. 28, 2023) (Holcomb, J.) (citation
23 omitted). [REDACTED]

24 [REDACTED] Dish's
25 "beneficiary" allegation cannot save its license entitlement argument in view of the
26 Promoter Agreement and IPR Policy's express language to the contrary. *See Valley*
27 *Nat'l Bank*, 2021 WL 6882194, at *3.
28

1 Accordingly, Dish is not entitled to bring the instant breach of contract claim
2 against MaxLinear or to claim any benefits of the IPR Policy.

3 **3. Dish’s Failure to Plead Performance Requires Dismissal**

4 Even if it had been a MoCA Alliance Party, Dish would be entitled to receive
5 a license under the IPR Policy only if it had requested one. But it does not plead
6 that it did so. (Counterclaims, ¶ 555 (recognizing that a RAND license offer occurs
7 only “upon receipt of such a request”); *see also id.*, ¶¶ 528, 531, 535.) That reality
8 harmonizes with the plain text of Section 5.1 of the IPR Policy, which requires a
9 license offer only “upon the written request of any other then-current Alliance
10 Party.” (IPR Policy, §5.1; *see also* § 7.1.)⁸

11 “It is elementary a plaintiff suing for breach of contract must prove it has
12 performed all conditions on its part or that it was excused from performance.”
13 *Consol. World Invs., Inc. v. Lido Preferred Ltd.*, 9 Cal. App. 4th 373, 380 (1992).
14 Here, Dish does not plead that it ever requested a RAND license, much less made
15 such a request in writing. That failure to plead performance, an essential element of
16 its breach of contract claim, requires dismissal of Count IV. *See Herrera v. Wells*
17 *Fargo Bank, N.A.*, 2020 WL 5802421, at *7 (C.D. Cal. Sept. 1, 2020) (granting-in-
18 part motion to dismiss breach of contract claims based on plaintiff’s failure to
19 request refund as contractually required); *Bugarin v. All Nippon Airways Co.*, 513
20 F. Supp. 3d 1172, 1192-93 (N.D. Cal. 2021) (same); *see also Vigdor v. Super Lucky*
21 *Casino, Inc.*, 2017 WL 2720218, at *3 (N.D. Cal. June 23, 2017) (granting-in-part

22
23 ⁸ Although MaxLinear first raised this deficiency on November 15, Dish refused to
24 amend its pleading and stated that it would consider amendment after reviewing
25 MaxLinear’s motion. On the eve of this filing, after MaxLinear declined an
26 invitation to delay filing this motion, Dish claimed for the first time that a Dish
27 entity (unclear which) had submitted a “written request for Entropic’s RAND
28 licensing rates.” Of course, this was not pled. To the contrary, in its pleading, Dish
claimed lack of knowledge, and on that basis denied Entropic’s allegations that
Dish’s products and services conform to certain MoCA standards.
(Compare Complaint, ¶¶ 39-43 with Answer, ¶¶ 39-43.) The IPR Policy requires a
former Alliance Party to make a written request to license the patents because it has
“Fully Compliant Products.”

1 motion to dismiss breach claim for failure to plead contractual triggering event).

2 As explained above, each pleading failure independently requires the
3 dismissal of Dish's breach of contract claim.

4 **B. Count III: Dish Cannot Request a Declaration Voiding the Patent
5 Assignments Due to Its Pleading Failures and Lack of Standing**

6 Dish's request for a declaration voiding MaxLinear's patent assignments to
7 Entropic similarly fails. Declaratory relief requires an actual controversy between
8 the parties "relat[ing] to a claim upon which relief can be granted." *Leadsinger,
9 Inc. v. BMG Music Publ'g*, 429 F. Supp.2d 1190, 1193 (C.D. Cal. 2005). "[A]
10 federal court may decline to address a claim for declaratory relief where the
11 substantive claims would resolve the issues raised by the declaratory action." See
12 *Cove Partners, LLC v. XL Specialty Ins. Co.*, 2016 WL 461918, at *12 (C.D. Cal.,
13 Feb. 2, 2016) (citation omitted).

14 First, Dish's declaratory judgment counterclaim against MaxLinear
15 (Count III) fails because it is derivative of Dish's breach of contract claim
16 (Count IV). Dish's pleading deficiencies as to Count IV therefore infect and
17 require the dismissal of Count III. See *Area 55, Inc. v. Amazon.com, Inc.*, 2011 WL
18 13101727, at *3 (S.D. Cal. July 25, 2011) (dismissing declaratory judgment
19 counterclaim where "no valid breach of contract claim ha[d] been stated");
20 *EurAuPair Int'l, Inc. v. Ironshore Specialty Ins. Co.*, 787 F. App'x 469, 471 (9th
21 Cir. 2019) (affirming dismissal of declaratory judgment claim where dismissal of
22 breach of contract claims meant there was no actual controversy); *Blue Novis, Inc.
23 v. U.S. All. Grp., Inc.*, 2021 WL 346422, at *6 (C.D. Cal. Jan. 27, 2021) (dismissing
24 declaratory judgment claim where Plaintiff was not an intended third-party
25 beneficiary to an agreement); see also *Cove*, 2016 WL 461918, at *12 (dismissing
26 declaratory relief action where "breach of contract, fraud, and fraudulent
27 inducement claims resolve[d] any existing controversy").

28 Second, the Court should dismiss Dish's declaratory relief counterclaim for a

1 separate, independent reason: lack of standing. To invoke the Court’s jurisdiction
2 against MaxLinear, Dish bears the burden of alleging specific facts sufficient for
3 Article III standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).
4 The trouble is, though, that Dish was never a MoCA member, and it is not entitled
5 to a RAND license offer under the IPR Policy for the reasons already noted.
6 “Generally, third parties do not have enforceable contract rights unless they are
7 intended third party beneficiaries.” *Dicion v. Mann Mortg., LLC*, 718 Fed. App’x
8 476, 478 (9th Cir. 2017) (citation omitted); *see also Wells Fargo Bank.*, 2009 U.S.
9 Dist. LEXIS 134120, at *14 (non-party generally has no right under a contract).
10 Put simply, Dish enjoys no vigilante right to enforce the contracts of other private
11 parties.

12 Moreover, Dish’s allegation that “[e]very party using technology contained
13 within the MoCA standards is an intended beneficiary . . . of voluntary contractual
14 commitments to MoCA” (Counterclaims, ¶ 550) cannot be reconciled with
15 [REDACTED] of the Promoter Agreement. [REDACTED]

16 [REDACTED] See IV.A.2,
17 *infra*. Accordingly, the Court should dismiss Count III based on Dish’s lack of
18 standing. *Cf. Warren v. Fox Fam. Worldwide, Inc.*, 328 F.3d 1136, 1142-43 (9th
19 Cir. 2003) (dismissal appropriate where pleadings facially do not demonstrate a
20 basis for standing in copyright case).

21 **C. Count V: Dish Fails to Plead a Claim for Fraud and Negligent
22 Misrepresentation**

23 The Court also should dismiss Dish’s fraud and negligent misrepresentation
24 counterclaims for failure to satisfy Rule 9(b) and for their facial implausibility.

25 In Count V, Dish asserts “[o]n information and belief” that MaxLinear
26 “represented to the members of MoCA and their affiliates – including Dish
27 California – that [it] would license the Asserted Patents under RAND terms and
28 conditions and ensure that future owners of the Asserted Patents would be obligated

1 to offer licenses under RAND terms and conditions.” (Counterclaims, ¶ 561.) On
2 its face, that conclusory statement is inadequate to plead fraud or negligent
3 misrepresentation. *Gabor v. County of Santa Clara Bd. of Supervisors*, 2008 WL
4 902407, at *4 (N.D. Cal. Mar. 31, 2008) (“Allegations that are vague or conclusory
5 are insufficient to satisfy the ‘particularity’ required by Rule 9(b).”).

6 Under Rule 9(b), a counterclaimant must specify the circumstances
7 constituting the alleged fraud with particularity. Negligent misrepresentation
8 claims are subject to this heightened pleading requirement. *See Hurd v. Boston Sci.*
9 *Corp.*, 2023 WL 3564741, at *3 (C.D. Cal. Apr. 10, 2023) (“In the Ninth Circuit,
10 claims for fraud and negligent misrepresentation must meet Rule 9(b)’s
11 particularity requirements.”) (Holcomb, J.) (citation omitted).

12 Rule 9(b) necessitates Dish to identify *specifically* what was fraudulent or
13 negligently misrepresented. Satisfying that requirement meant, at the minimum,
14 identifying (1) what specifically was misrepresented, (2) who made the
15 representation, (3) why the representation is false, and (4) when the representation
16 occurred. *See Schreiber Distribut. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d
17 1393, 1401 (9th Cir. 1986) (“[T]he pleader must state the time, place, and specific
18 content of the false representations as well as the identities of the parties to the
19 misrepresentation”); *Hurd*, 2023 WL 3564741, at *3 (“[A] complaint generally
20 must also identify the person who made the false representations on behalf of the
21 entity.”) (citation omitted). Dish’s cursory fraud and negligent misrepresentation
22 allegations provide none of that information. For example, they do not specify the
23 allegedly fraudulent statements, who made them and when, or to whom they were
24 made.

25 Nor does Dish allege that MaxLinear (and not Entropic) made a
26 representation that was false “when it was made.” *See Smith v. Allstate Ins. Co.*,
27 160 F. Supp. 2d 1150, 1152 (S.D. Cal. 2001) (“[T]he plaintiff must plead facts
28 explaining why [a] statement was false when it was made.”). Dish alleges only that

1 Entropic failed to “offer Dish California a license to the Asserted Patents under
2 RAND terms.” (Counterclaims, ¶ 562.) But this alleged failure does not involve a
3 “false” statement, as the IPR Policy did not obligate Entropic to license any
4 Essential Patent Claims to Dish, a non-MoCA member. Nor does this alleged
5 failure involve MaxLinear. In addition, acts or omissions that Entropic performed
6 in the *present* cannot show that a *past* MaxLinear statement was false. *See Dotson*
7 *v. Europharma, Inc.*, 2021 WL 4826611, at *6 (C.D. Cal. May 27, 2021) (A
8 plaintiff cannot “simply point[] to a defendant’s statement, not[e] that the statement
9 conflicts with the current state of affairs, and then conclud[e] that the statement in
10 question was false when made.”) (citation omitted).

11 Furthermore, “[a]s with all other elements of a claim based on fraud, a
12 complaint must plead reliance and causation with particularity.” *Renowitzky v.*
13 *Wells Fargo Bank N.A.*, 2016 WL 3276976, at *8 (N.D. Cal. June 15, 2016); *see*
14 *Ashcroft*, 556 U.S. at 678 (“A claim has facial plausibility when the plaintiff pleads
15 factual content that allows the court to draw the reasonable inference that the
16 defendant is liable for the misconduct alleged.”). Again, Dish has not supplied any
17 facts necessary to support an inference that it reasonably relied on any alleged
18 MaxLinear misrepresentation.

19 Dish merely states that “its affiliation with a MoCA member and
20 incorporation of certain MoCA technology in its products” show its reliance.
21 (Counterclaims, ¶ 563.) But conclusory allegations of that sort are facially
22 insufficient. A claim of fraud “requires a plaintiff to allege specific facts not only
23 showing [it] actually and justifiably relied on the defendant’s misrepresentations,
24 but also how the actions [it] took in reliance on the defendant’s misrepresentations
25 caused the alleged damages.” *Tabletop Media, LLC v. Citizen Sys. of Am. Corp.*,
26 2017 WL 10591885, at *5 (C.D. Cal. Mar. 3, 2017) (citation omitted). Here, Dish
27 does not say that it designed its products after the alleged misrepresentations or
28 that, but for the alleged misrepresentations, it would have used a different design.

1 Importantly, Dish’s Answer undercuts any claim of reliance. Dish denies
2 Entropic’s allegations that Dish’s products and services conform to certain MoCA
3 standards based on its “lack[] [of] knowledge or information sufficient to form a
4 belief.” (*Compare* Complaint, ¶¶ 39-43 *with* Answer, ¶¶ 39-43.) That denial is
5 fatal. Dish cannot credibly assert, on one hand, that it relied on MaxLinear’s
6 supposed misrepresentations in conforming its products to the MoCA standards,
7 and, on the other hand, that it does not even know whether its products comply with
8 those standards.

9 The Court should dismiss the fraud and negligent misrepresentations
10 counterclaim for the simple reason that Dish failed to state a plausible claim. *See*
11 Fed. R. Civ. P. 9(b); *Ashcroft*, 556 U.S. at 678-679 (“[O]nly a complaint that states
12 a plausible claim for relief survives a motion to dismiss.”).

13 **D. Dish Fails to Plead the Elements for Civil Conspiracy or the
14 Underlying Torts**

15 In Count VI, Dish alleges a civil conspiracy claim against MaxLinear and
16 Entropic. (Counterclaims, ¶¶ 568-71.) This Counterclaim, too, hinges on its claims
17 for breach of contract (Count IV) and fraud and negligent misrepresentation
18 (Count V). In particular, Dish alleges that MaxLinear and Entropic engaged in a
19 civil conspiracy to induce Entropic to breach the IPR Policy and to engage in fraud
20 or negligent misrepresentation.

21 As noted above, the Court should dismiss Counts IV and V for failure to state
22 a claim. *See supra* §§ IV.A and IV.C. That failure, in turn, warrants the dismissal
23 of Count VI. *See Mintel Learning Tech., Inc. v. Beijing Kaidi Educ.*, 2007 WL
24 2288329, at *4 (N.D. Cal. Aug. 9, 2007) (“If the plaintiff fails to adequately plead
25 the underlying claim, the corresponding conspiracy claim must also fail.”).

26 The Court also should dismiss Count VI for the independent reason that Dish
27 has not adequately pleaded the elements for a civil conspiracy. Those elements
28 include “(1) the formation and operation of a conspiracy, (2) wrongful conduct in

1 furtherance of the conspiracy, and (3) damages arising from the wrongful conduct.”

2 *Id.*

3 “[A] civil conspiracy claim requires ‘that each member of the conspiracy
4 acted in concert and came to a mutual understanding to accomplish a common and
5 unlawful plan.’” *Lynwood Invs. Cy Ltd. v. Konovalov*, 2021 WL 1164838, at *17
6 (N.D. Cal. 2021) (citation omitted). “A civil conspiracy, however atrocious, [also]
7 does not give rise to a cause of action unless a civil wrong has been committed
8 resulting in damage.” *Allied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7
9 Cal.4th 503, 511 (1994) (citation omitted). In other words, the wrongful conduct
10 must cause damages. *See id.*

11 Here, Dish does not allege that the alleged co-conspirators had an agreement
12 or understanding to engage in a common plan. Nor does it identify a single
13 wrongful act that the alleged co-conspirators took to further the conspiracy. Dish
14 did not identify a specific instance of wrongful conduct causing damages.

15 Instead, Dish generically alleges, “on information and belief,” that the
16 alleged conspirators had knowledge of a planned tort and “concurred in the tortious
17 scheme. . . .” (Counterclaims, ¶ 570.) Dish also generically alleges that MaxLinear
18 and Entropic engaged in unspecified “acts designed to induce a breach or disruption
19 of the contractual relationship.” (*Id.*, ¶ 571.) Such “allegations of conspiracy do
20 not sufficiently provide the details of the conspiracy” because they are “all made on
21 ‘information and belief’ without providing any factual basis for those beliefs or are
22 merely conclusory.” *MGA Ent., Inc. v. Dynacraft BSC, Inc.*, 2018 WL 2448123, at
23 *7 (C.D. Cal. 2018). In view of those pleading deficiencies, MaxLinear
24 respectfully asks the Court to dismiss Count VI.

25 **V. THE COURT SHOULD NOT GRANT LEAVE TO AMEND**

26 “Although . . . leave to amend should be ‘freely’ given [under Rule 15], that
27 liberality does not apply when amendment would be futile.” *Ebner v. Fresh, Inc.*,
28 838 F.3d 958, 968 (9th Cir. 2016); *see also Plaza Bank v. Green*, 599 Fed. App’x

1 801, 802 (9th Cir. 2015) (affirming dismissal without leave to amend where
2 “[t]here was no legal basis for the counterclaims and thus any factual amendment
3 would have been futile”). A court may deny leave to amend if it determines that
4 “allegation of other facts consistent with the challenged pleading could not possibly
5 cure the deficiency.” *Albrecht v. Lund*, 845 F.2d 193, 195, amended, 856 F.2d 111
6 (9th Cir. 1988) (citations omitted). The Court should deny leave to amend for three
7 reasons.

8 First, amendment would be futile. All of Dish’s Counterclaims against
9 MaxLinear depend on Dish’s alleged entitlement to a RAND license offer as an
10 affiliate of EchoStar, formerly an Alliance Party. (Counterclaims, ¶ 535
11 (“Although affiliates for Dish California withdrew from MoCA, Dish California
12 retains its benefits under the MoCA IPR Policy including the right to a RAND
13 license under § 5.1.1 as an affiliate.”).) Without that keystone allegation, the entire
14 pleading crumbles.

15 As noted, Dish has no such right. (IPR Policy § 5.1.1 (“[U]pon the written
16 request of any other then-current Alliance Party, each Alliance Party shall offer to
17 license to the *requesting Alliance Party(ies)*”)) (emphasis added); RJN Ex. B.) Dish
18 can say nothing and add nothing to its Counterclaims to change that fact. Any
19 amendment would only prove futile, as well as an unnecessary waste of this Court’s
20 time and resources. “Futility alone can justify a court’s refusal to grant leave to
21 amend.” *Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir. 2015); *see also*
22 *Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999)
23 (“Where the legal basis for a cause of action is tenuous, futility supports the refusal
24 to grant leave to amend”).

25 Second, the Court should deny leave to amend because Dish’s Counterclaims
26 raise issues redundant to those already before the Court through the Complaint and
27 Dish’s affirmative defenses. (*See, e.g.*, Answer, ¶¶ 482-496, 499 (asserting
28 affirmative defenses of license, waiver, equitable estoppel, damages limitation

1 based on RAND obligation, and unenforceability).) As this Court has explained,
2 “several district courts within the Ninth Circuit have found that counterclaims for
3 declaratory relief are improper if ‘repetitious of issues already before the court via
4 the complaint o[r] affirmative defenses.’” *Fishbaugh v. Arteom*, 2021 WL
5 3598579, at *7-8 (C.D. Cal. July 8, 2021) (citation omitted). Where a “claim is
6 redundant to issues already before the Court, amendment would be futile, and the
7 claim [should be] dismissed *without* leave to amend.” *Id.* The Court should do so
8 again here.

9 Third, Dish’s dilatory litigation conduct provides yet another reason for
10 denying leave to amend. In mid-November, MaxLinear engaged in a series of
11 discussions with Dish to explain these deficiencies in the hopes of avoiding motion
12 practice. Although believing amendment to be futile, MaxLinear nevertheless
13 asked Dish if it wished to amend. (Lee Decl., ¶ 4.) Dish refused, stating that it
14 would evaluate whether to amend *after* MaxLinear filed its motion to
15 dismiss. (*Id.*) On December 15, 2023, MaxLinear urged Dish to voluntarily
16 dismiss this action in light of the newly produced Promoter Agreement. (*Id.*, ¶ 6.)
17 Again, Dish refused to do so. Instead, it merely offered MaxLinear an extension, in
18 the event the other Dish defendants file counterclaims in this Court. (*Id.*)
19 MaxLinear declined to invite more delay, as it had fully drafted this instant motion.
20 (*Id.*, ¶ 7.) After, on the eve of filing of this motion, Dish sent MaxLinear a letter
21 insinuating that Dish could plead allegations to make its claims suddenly plausible.
22 (*Id.*) It is all too little, too late. Dish chose not to amend, and its pleadings’ fatal
23 deficiencies cannot be cured.

24 **VI. CONCLUSION**

25 Dish has failed to prove that a contract exists, that it has any rights under
26 such a contract, or that an Alliance Party ever requested a license under the MoCA
27 IPR Policy. In tandem, Dish failed to satisfy the heightened pleading requirements
28 for fraud and negligent misrepresentation. Its declaratory judgment and civil

1 conspiracy counterclaims depend entirely on its other counterclaims and are
2 deficient for the same reasons. MaxLinear therefore urges the Court to dismiss
3 Dish's Counterclaims against MaxLinear (Counts III-VI) with prejudice.

4 Dated: December 22, 2023

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CERTIFICATE OF COMPLIANCE

2 The undersigned, counsel of record for Counter-Defendants MAXLINEAR,
3 INC. and MAXLINEAR COMMUNICATIONS LLC, certifies that this brief
4 contains 6722 words, which complies with the word limit of L.R. 11-6.1.

Dated: December 22, 2023

By: /s/ Bita Rahebi
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